United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

550

No. 22,110

DENIS RENDE, by his mother and next friend,
Mrs. Carol W. Rende,
JOHN RENDE
and
CAROL W. RENDE,

Appellants,

vs.

ALFRED S. KAY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS AND APPENDIX

ARTHUR M. WAGMAN
1835 K Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

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TABLE OF CASES AND AUTHORITIES CITED

STATEMENT OF ISSUES PRESENTED FOR REVIEW*

1. Was the trial court correct in dismissing with prejudice appellants' action under that provision of Federal Rule 25 (a)(1) which requires a party to an action to move to substitute the proper parties for a deceased party within 90 days after the Suggestion of Death is noted on the record, when no legal representative had been appointed for the deceased defendant-appellee appellants being the only parties before the court, the Suggestion of Death did not contain the name of a representative for appellee and the motion to dismiss was made in the name of the counsel for appellee?

2. If the suggestion of death of a defendant noted by defendant's counsel, there being no representative of the decedent, is sufficient compliance with Federal Rule 25 (a)(1) to impose the 90-day time limitation, does plaintiffs's failure to make the proper motion within the time limitation because plaintiffs's counsel was severely injured and unable to practice for an extended period, beginning on the forty-third day of the 90 day period, constitute excusable neglect under Federal Rule 6 (b) ?

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*This case has not previously been heard by this court.

STATEMENT OF THE CASE

John Rende and Carol Rende, his wife, in their own name and as parents and next friends of their infant son, Denis, sued Alfred S. Kay, resident of the State of Maryland, in the United States District Court for the District of Columbia to recover for injuries sustained by Denis Rende, when he, then aged three, was struck and run over in the District of Columbia by an automobile owned and operated by Alfred S. Kay on September 3, 1966.

On August 27, 1967, Alfred S. Kay, a man in his seventies, died. He left a will which was filed in the Orphans Court for Montgomery County, Maryland, where Mr. Kay resided at the time of his death on or about September 1, 1967. This will, which named Mr. Kay's widow as his executrix, has not been admitted to probate as yet nor has any legal representative for Mr. Kay been appointed or qualified in any jurisdiction to appellants's knowledge.

On September 1, 1967, counsel for Mr. Kay suggested his client's death on the record and mailed a copy of the notice to appellants's counsel. (J.A. 1)

On October 14, 1967, counsel for appellants was seriously injured in an auto accident, was hospitalized for five weeks, convalesced for another six weeks before returning to his office on January 2, 1968, and then, not full time. Counsel was on crutches until April 16, 1968.

Prior to his accident, appellants's counsel made no objection to the form or content of the suggestion of death. With the will of Mr. Kay on file, counsel assumed it would be probated in the due course of time, the executrix appointed within the 90-day period. Then, upon her appointment, the motion to substitute could be made.

During counsel's protracted absence from his office, this case was handled by counsel's partner who was attempting to do the work of the entire office, his own, counsel's, and to carry on the office routine. This case was

not a partnership matter, having been instituted before the partnership was formed, and as a result, counsel's partner, unaware of the suggestion of death and never informed by appellee's counsel with whom he had discussed the case on more than one occasion, of the fact that such suggestion of death had been made, did not undertake to protect the record.

Upon the return of appellants's counsel to his office and after he had an opportunity to review the file and to learn that no successor to Mr. Kay had as yet been appointed, appellant's counsel moved to certify the case to the ready calendar. (J.A. 2)

This was opposed by appellee's counsel who gave as his reason that discovery procedures has not yet been completed. (J.A. 3)

On April 5, 1968, at a hearing before the pretrial examiner, the certification to the ready calendar was delayed for three months. (J.A. 3)

On April 19, 1968, counsel for appellee moved in his own name to dismiss the action on the ground that appellants had not complied with the requirements of Rule 25 (a) (1) and had failed to make a motion to substitute a proper party within the 90 day period. (J.A. 4)

Appellants opposed this motion. (J.A. 5)

On May 14, 1968, the motion was heard by Judge Curran and granted.

The order of dismissal was signed on May 15, 1968. (J.A. 7)

Appellants opposed the form of the order in that it dismissed the action with prejudice. (J.A. 7) Appellants then filed a motion for reconsideration with points and authorities which was denied without a hearing. (J.A. 8,9,10)

SUMMARY OF ARGUMENT

1. Upon the death of defendant-appellee, plaintiffs-appellants were the only party before the court until a successor to the deceased party was substituted or otherwise came before the court. Therefore, counsel for appellee had no capacity to act until a successor was appointed. If, nonetheless, counsel for appellee did act prior to the appointment of a successor, such action was defective since appellee's counsel represented no one from whom he could derive the authority to act, and the trial court erred in granting the motion to dismiss made by appellee's counsel in his own name.

2. If, arguendo, appellee's counsel had authority to act, under the Rule 25 (a)(1), he was required to name the representative of appellee in the suggestion of death. Otherwise, the suggestion of death was improper as to content, the time limitation was not imposed, and accordingly, the motion to dismiss should not have been granted. To hold differently would be to impose on appellants the burden of moving to substitute for appellee a non-existent representative.

3. If, arguendo, counsel for appellee could have acted prior to the appointment of a representative and if the suggestion of death, despite its failure to name the personal representative, did impose the 90 day limitation the court had discretion to enlarge that period for good cause shown under Rule 6(b) which was amended for that purpose.

4. Appellee did not and could not show that he was in any way injured by the delay of appellants in moving to substitute his successor.

5. Failure of the trial court to enlarge the period when appellant's counsel represented to the court that he had been unable to act due to severe injuries resulting from an accident was an abuse of discretion.

ARGUMENT

1. Upon the death of the defendant-appellee, plaintiffs-appellants were the only party before the court until a successor to the deceased party was substituted or otherwise came before the court. Therefore, counsel for appellee had no capacity to act until a successor was appointed. If, nonetheless, counsel for appellee did act prior to the appointment of a successor, such action was defective since appellee's counsel represented no one from whom he could derive the authority to act, and the trial court erred in granting the motion to dismiss made by appellee's counsel in his own name.

The appellee* died on August 27, 1967. On September 1, 1967, before an executor or administrator was appointed, appellee's counsel suggested the death of appellee, Alfred S. Kay. (J.A. 1)

Counsel for the deceased appellee was not the personal representative or successor of appellee and could not act as such. He had no right to substitute himself for appellee or to make in his own name a motion to dismiss for appellants' failure to move within 90 days the substitution of a non-existent executor or administrator.

The death of one of the parties having an interest in the litigation operates to suspend the proceedings until someone legally capable of asserting and defending that interest shall either come or be brought into the suit in the place of the deceased.

Ex parte Slater, 246 US 129, 62 L ed 621, 38 S Ct 265

In Edmundson et al vs. State of Nebraska, 383 Fad 124 (8th CA 1967) the court commented on a trial court's ability to act with one of the parties to the suit deceased and no substitution having been made, as follows:

*Following the path taken by this court in Roscoe vs Roscoe, 379, F2d 95, 10 FR Serv 2d 25 a.1, Case 1 (1967) in which, because of the defendant's demise, plaintiff was the only party before the trial court at the time the action was dismissed, we, too, shall in this brief, as a matter of convenience, refer to the deceased as "appellee".

"However, the rationale behind Rule 25 would seem to be applicable. The party herein seeking intervention is no longer in existence. Therefore, there is no person before the court on which the court's judgments and actions can take effect. There is no existing person whose rights can be adjudicated. Thus substitution of the parties would seem to be necessary."

The court then added:

"Failure to amend or substitute leaves the court unable to act."

The court below should not have acted upon the motion to dismiss made by appellee's counsel because appellee was not before the court. It was appellee who should have made that motion. Therefore, the trial court erred in granting the motion to dismiss.

Roscoe vs. Roscoe, 379 F2d 95, 10 FR Serv 2d a.1, Case 1.

2. If, arguendo, appellee's counsel had authority to act, under the Rule 25 (a)(1), he was required to name the representative of appellee in the suggestion of death. Otherwise, the suggestion of death was improper as to content, the time limitation was not imposed, and accordingly, the motion to dismiss should not have been granted. To hold differently would be to impose on appellants the burden of moving to substitute for appellee a non-existent representative.

The suggestion of death noted by appellee's counsel on September 1, 1967, did not comply with the requirements of Federal Rule 25 (a)(1) or follow Official Form 30 as to form or content. Form 30, added when the rule was amended, sets forth the minimum information a suggestion of death should contain to meet the rule's requirements. This minimum information calls for the death to be suggested by a party or by the executor, administrator, or other representative or successor of the deceased party. (Federal Rule 84)

Therefore, since the suggestion of death was not in proper form, the time limitation was not imposed.

If the time limitation is to be strictly interpreted and applied, then the requirements as to the form and contents of the suggestion of death must be rigidly construed.

Appellants contend that under the rule, the omission of the name of the representative of the deceased appellee from the suggestion of death prevented

the imposition of the time period. Rule 25 (a)(1) requires the substitution of proper parties. In this action, the term "proper parties" refers to appellee's representative, such as his executor or administrator, not appellee's counsel.

Mallonee vs Fahey, 200 F2d 918, 18 FR Serv 25 a.24 (1952)

Nor was appellee's widow, Mrs. Hannah Kay, a proper party even though she had been named as appellee's executrix in appellee's will which had been filed, but never probated, in the Orphans' Court for Montgomery County, Maryland, where appellee resided at the time of his death. She could not be appellee's legal representative until she was appointed and qualified.

Talbot v Ledgewood Circle Shopping Center, 194 F Supp 191, 4 FR Serv 25 a.5 (EDNY)

Therefore, at no time was there a successor to appellee who could have noted the Suggestion of Death on the record, been served with the motion to substitute or named in such motion, or could have moved to dismiss this action.

This contention is supported by the Advisory Committee's notes to Rule 25 (a)(1). Although the rule does not delineate the parties who may suggest the death upon the record, it suggests that the suggestion of death is to be entered by any of the parties, including the legal representatives of the deceased, who may make the motion for substitution. The Advisory Committee's note says:

> A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or a representative of the deceased party desires to limit the time within which another may bring the motion, he may do so by suggesting the death upon the record.

2 Bender's Fed. Practice 665

This is further strengthened by the language of Official Form 30, the form added when the rule was amended, which calls for the suggestion of death to be

made in the name of a party or the legal representative of the deceased party.

The trial court's decision to grant appellee's motion to dismiss was based upon the erroneous conclusion by the court that the burden of providing a proper party for appellee rested upon appellants, and that the suggestion of death, as noted, was adequate.

That was evident in statementsmade by the court at the hearing of the motion:

> MR. WAGMAN: If it please the court, first of all the suggestion of death was defective in that it did not list the name of the proper party; that is the legal representative of the defendant. As I recall the suggestion of death said, "Come now the defendant by counsel and suggest the death of the defendant."
>
> THE COURT: What is wrong with that?
>
> MR. WAGMAN: You have to have a proper party, Your Honor.
>
> THE COURT: That would not be his burden.

(J.A. 7)

3. If, arguendo, counsel for appellee could have acted prior to the appointment of a representative and if the suggestion of death, despite its failure to name the personal representative, did impose the 90 day limitation the court had discretion to enlarge that period for good cause shown under Rule 6(b) which was amended for that purpose.

The trial court's finding was contrary to the intent of the 1963 amendment of Rule 25 (a)(1) which was to liberalize the rule.

Roscoe vs Roscoe, 379 F2d 95, 10 FR Serv 2d 25 a.1, Case 1 (App DC 1967)
Staggers vs Otto Gerdau Co., Inc., 359 F2d 293, 10 FR Serv 2d 25 a.3 (1966)

This rule operates primarily against the plaintiff in an action since the defendant usually has no objection to the case being dismissed. In the case at bar, appellee was the defendant in the original suit and his death was suggested by his counsel. If appellee's suggestion of death is held to be in proper form so as to impose the time limitation upon appellants, then, the rule has not been liberalized at all, but has been made extremely harsh, punitive

and unfair.

In Staggers v Otto Gerdau Co., Inc., the court noted:

> "But the history of the 1963 amendment makes clear that the 90 day period was not intended to act as a bar to otherwise meritorious actions. See 4 Moore, Federal Practice 25.01-02 (2d ed 1965 Supp)

Appellants were in no position to know of appellee's death or to control the suggestion of appellee's death on the record. Appellants could not determine, control, or influence the appointment of appellee's executor or administrator.

Most certainly, the purpose of the amended rule was not to make appellants, as plaintiffs, bear the burden of arranging for the appointment of an executor or administrator for appellee within 90 days from the date appellee suggested his own death on the record or else, suffer dismissal of the action.

This rule is based in part upon 42 Statute 352, 28 USCA Sec. 778, which was designed to keep short the time within which actions might be revived so that the closing and distribution of estates might not be interminably delayed. Anderson v Yungkau, 329 US 482, 67 S Ct 428, 91 Led 436, 10 FR Serv 24 a.1, Case 1 (19)

4. Appellee did not and could not show that he was in any way injured by the delay of appellants in moving to substitute his successor.

Appellee suffered no prejudice from any delay in substituting the proper party. In fact, the delay, if any, was appellee's own doing or lack of doing. The span of time from date of death to date of dismiss of the action was quite short. Appellee died August 27, 1967. He suggested his death on September 1, 1967, and moved to dismiss the action on April 16, 1968, less than eight months after his death, and without having made any move whatsoever during that interval to have a representative appointed.

Furthermore, on March 16, 1968, appellee opposed appellants' attempt to place the case on the Ready Calendar only on the ground that appellee had not

completed discovery. (J.A. 3)

At no time did appellee give to appellants notice of the appointment of his successor or notice of his intent not to have a personal representative appointed and qualified. As a result of appellee's omissions and commissions, appellee was estopped from moving to dismiss this action, exclusive of all other reasons advanced in this brief. We contend this position is supported by the following cases:

Iovino vs. Waterman, 274 F2d 41 (1959), cert den 362 US 949, 80 S Ct 860, 4 L ed2d 867 (1960)

Simmons v King, 333 F2d 178 8FR Serv 2d 25 a.1, Case 1 (CA 4th 1964)

In each of the following cases, Graham vs. Pennsylvania Railroad, 119 US App DC 335, 342 Fed 914 (1964) and Staggers vs. Otto Gerdau Co., Inc. 359 F2d 293, 10 FR Serv 2d 25 a.3 (1966) it was the plaintiff who died and plaintiff's counsel who suggested the death on the record, the time of suggesting death being within plaintiff's control.

In this case, it was appellee, the defendant, who died and it was appellants who were imposed with the burden of unearthing appellee's successor within 90 days. We do not believe Rule 25 (a)(1) was intended to create a guessing game.

In Graham vs. Pennsylvania Railroad, this court affirmed the ruling of the lower court in dismissing the action, and in doing so, commented that appellants's counsel had known the name of appellant's executor within three days after he had suggested the death of his client on the record.

Appellants in this action have never had the name of appellee's executor.

In Staggers vs. Otto Gerdau Co., Inc., the court said

> "Rule 6 (b) of the Federal Rules of Civil Procedure was also amended in 1963 and the prohibition against extending the time for taking action under Rule 25 was eliminated. The Advisory Committee on the Civil Rules noted: 'It is intended that the Court shall have discretion to enlarge that period.' The amendment of Rules 6 (b) and 25 (a)(1) provided needed flexibility. It was assumed that discretionary

> extensions would be liberally granted. Movants under Rule 25 can ordinarily control when a death is 'suggested upon the record' and appellant's attorney was under no obligation to file his affidavit of Staggers' death on the date he did. He could have filed it later."

In the present case, appellants could not control the date of filing of the suggestion of death. And the delay, if any, was caused by appellee and has been prejudicial primarily to appellants.

5. Failure of the trial court to enlarge the period when appellant's counsel represented to the court that he had been unable to act due to severe injuries resulting from an accident was an abuse of discretion.

Admitting arguendo that the 90 day time period commenced to run upon the noting of appellee's death on the record, appellants contend that the failure of appellants to move for the substitution of appellee's non-existent legal representative or to extend the time to make the motion until appellee had a successor appointed constituted "excusable neglect" under Federal Rule 6 because of appellants's counsel's prolonged absence due to injuries he suffered in an auto accident.

Appellants's counsel was seriously injured on October 14, 1967, 43 days after the date appellee's suggestion of death was noted on the record. He returned to his office on January 2, 1968, on a limited basis. He was using crutches, was still under doctor's care and treatment, did not work full time, and remained on crutches until April 16, 1968.

The 90-day period expired November 29, 1967, at which time appellants's counsel had been out of the hospital about 10 days and was convalescing at home.

The unexpected, unforeseen and protracted absence of appellants's counsel from his practice gave rise to confusion and unfortunate delays in many cases, of which this was one. In this particular case, the confusion was compounded because no representative had been appointed for appellee.

Appellee had suggested his death within four days after he had died. His will had been promptly filed in the Montgomery County Orphans Court and it named

an executrix. Because it could reasonably be expected that the appointment and qualification of appellee's successor would take some time and that appellee would then notify appellants of such appointment, appellants's counsel prior to his accident, made no move to challenge in court the form and content of appellee's suggestion of death under the amended Rule 25 (a)(1).

Upon his return and under the stress of picking up all the loose ends of a disrupted practice, appellants's counsel did not pick up the point which had been buried by counsel's absence, in time and in the file under medical reports and correspondence relative to a possible settlement that had passed between appellee's counsel and appellants's counsel's associate during the interval of the absence of appellants's counsel.

As soon as he could, appellants's counsel moved to certify the case to the Ready Calendar. (J.A. 2) This was opposed by appellee solely on the ground that appellee had not completed his discovery. (J.A. 3)

On April 5, 1968, the pretrial examiner sustained appellee's opposition and recommended that the case be put on the Ready Calendar as of June 7, 1968. (J.A. 3) No other reason in opposition was advanced by appellee at the hearing before the pretrial examiner.

On April 16, 1968, appellee's counsel, in his own name, made a motion to dismiss which was granted by the trial court on May 14, 1968.

Appellants suggest if appellants's counsel was neglectful either in failing to make a timely motion to the trial court or by not petitioning for the appointment of an administrator ad litem, this was excusable neglect under the circumstances and the trial court erred in granting the motion to dismiss made by appellee's counsel.

CONCLUSION

The order of the trial court dismissing the action with prejudice should be reversed and required to be vacated by the mandate of this court.

Respectfully submitted

ARTHUR M. WAGMAN
1835 "K" Street, N. W.
Washington, D. C. 20006
Attorney for Appellants

CONTENTS OF JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DENIS RENDE, by his mother and next friend, Mrs. Carol W. Rende and JOHN RENDE and CAROL W. RENDE	:	
Plaintiffs	:	
v.	:	Civil Action No. 2632-66
ALFRED S. KAY	:	
Defendant	:	

SUGGESTION OF DEATH

Come now counsel for defendant and suggest unto this Honorable Court the death of the defendant, Alfred S. Kay, on August 28, 1967.

BUTLER & GORMAN

By _____
Edward J. Gorman, Jr.
1518 K St., N. W.
Washington, D. C. 20005
347-2872
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed postage prepaid this 1st day of September, 1967 to Arthur M. Wagman, Esquire, Attorney for Plaintiffs, 1835 K St., N. W.

BUTLER & GORMAN

By _____

CERTIFICATE OF READINESS

This is to certify that the above-entitled cause is actually ready for trial.

Arthur M. Wagman

~~1025 F Street, N. W.~~
Address

~~Washington, D. C. 20036 (296-5930)~~
Attorney for

NOTE:

Unless opposition to the above Certificate of Readiness is filed within ten days from date of service, the cause shall be placed on the Ready Calendar, pursuant to Local Rule 11(d), as amended, April 4, 1962.

I hereby certify that I have served a copy of the above Certificate of Readiness by (mailing)~~(delivering)~~ a copy thereof on the 26th day of March, 1968 to:

Edward J. Gorman, Jr., Esq., Butler & Gorman, 1518 K Street, N. W., Washington, D. C., 20005, Counsel for defendant.

Butler & Gorman

1518 K St., N. W.

Attorney for ~~Plaintiff~~ Defendant

Attorney for Plaintiff

OPPOSITION TO CERTIFICATE OF READINESS

Comes now the defendant, by his attorneys, Butler and Gorman, and opposes the Certificate of Readiness filed in this case and for reason therefore states as follows:

1. That discovery is not as yet complete.

For this reason and others that will be called to the attention of the court upon hearing, it is respectfully requested that this matter not be certified to the Ready Calendar at this time.

BUTLER & GORMAN

By _____
Edward J. Gorman, Jr.
Attorneys for Defendant

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of defendant's opposition to Certificate of Readiness,

and oral argument thereon,

it is this 5th day of April, 19 68,

RECOMMENDED that said opposition be sustained and it is further

RECOMMENDED that the case be placed on the Ready Calendar as of June 7, 1968.

PRETRIAL EXAMINER

MOTION TO DISMISS

Come now Butler & Gorman, and move this Honorable Court to dismiss this cause of action against the defendant Alfred S. Kay, deceased, and for reasons, therefore, state as follows:

1. The defendant died on August 27, 1967. A Suggestion of Death was filed on September 1, 1967 and a copy forwarded to attorney for plaintiffs on that date by first-class mail.

2. Under Rule 25(a)(1) there is a ninety-day period in which a proper party must be substituted for the decedent.

3. More than 220 days have passed since the filing of the Suggestion of Death and no substitution for proper party has been made.

BUTLER & GORMAN

By_____
Edward J. Gorman, Jr.
1518 K Street, N. W.
Washington, D. C. 20005
347-2872
Attorneys for Defendant

POINTS AND AUTHORITIES

1. Rule 25(a)(1).

2. Graham v. Pennsylvania Railroad, 119 U.S. Ap., DC. 335 (1964), 342 F. 2d 914.

BUTLER & GORMAN

By_____
Edward J. Gorman, Jr.
1518 K Street. N. W.

OPPOSITION TO MOTION

Comes now Arthur M. Wagman, Counsel for Plaintiffs, and in opposition to the Motion to Dismiss filed by Attorneys for Defendant states as follows:

1. Although Suggestion of Death was filed, no executor or administrator for the deceased defendant has been appointed either in Montgomery County, Maryland in which jurisdiction defendant resided at the time of his death or in the District of Columbia. The will of the defendant was filed but not admitted to probate in the Orphans Court of Montgomery County, Maryland.

2. Although defendant's counsel filed a Suggestion of Death, said Suggestion did not list any person who could be named as proper party upon whom substitution could be effected.

3. Under Rule 25 A-1, as amended in 1963, the ninety (90) day period may be extended within the discretion of the court.

4. That counsel for plaintiffs was seriously injured in an automobile accident on October 14, 1967; that he was in the hospital and under doctor's care from that date until April 15, 1968, at which time he was discharged by his doctor and returned to work on a full time basis.

_____

ARTHUR M. WAGMAN
Attorney for Plaintiffs
1835 K Street, N. W.
Washington, D. C. 20006

SUBSCRIBED and SWORN to before me this_____day of_____, 1968.

_____

NOTARY PUBLIC, D. C.

Tuesday, May 14, 1968

The above-styled motion came on before the HONORABLE EDWARD M. CURRAN, Chief Judge, at approximately 10:30 a.m.

APPEARANCES:

On behalf of the Plaintiff:

Arthur M. Wagman, Esq.

On behalf of the Defendant:

Edward Gorman, Esq.

* * * * * * * *

Extract beginning Tr. 2 to Tr. 3:

MR. WAGMAN: If it please the Court, first of all the suggestion of death was defective in that it did not list the name of the proper party; that is the legal representative of the defendant. As I recall the suggestion of death said, "Come now the defendant by counsel and suggest the death of the defendant."

THE COURT: What is wrong with that?

MR. WAGMAN: You have to have a proper party, Your Honor.

THE COURT: That would not be his burden.

* * * * * * * *

O R D E R

This matter having come before the Court on the Motion to Dismiss against the defendant Alfred S. Kay, deceased, and after oral argument, the Court being fully advised of the premises, it is by the Court this____day of _____, 1968:

ORDERED, that the case be, and it hereby is, dismissed with prejudice.

_____
Chief Judge

OBJECTION TO ORDER SUBMITTED BY DEFENDANT

Come now the plaintiffs by counsel and object to the form of the Order submitted by counsel for defendant for the dismissal of the above entitled cause in that said Order improperly includes the words "with prejudice".

Counsel for defendant did not request dismissal with prejudice nor did the court grant the dismissal with prejudice.

WHEREFORE, the premises considered, counsel for plaintiffs submits the proposed Order attached hereto.

S P E R O & W A G M A N

By: _____
Arthur M. Wagman
Attorney for Plaintiffs

MOTION TO VACATE ORDER AND FOR REHEARING AND RECONSIDERATION

Comes now the plaintiff by counsel and moves this Court to vacate and set aside its order dismissing this cause, entered against plaintiff on May 15, 1968, and as reason therefor says as follows:

1. The failure of counsel for plaintiff to make a timely motion for substitution was excusable neglect under the circumstances in that prior to the expiration of the 90-day period, on the 48rd day after the filing of the suggestion of death by defendant's counsel, plaintiff's counsel was seriously injured and was absent from his office for a period far in excess of the 90-day period, and then returned on a part time basis only for some three months thereafter, as more fully appears in Memorandum of Points and Authorities annexed hereto.

2. To date, no legal representative of deceased defendant has been appointed; the suggestion of death listed no legal representative of the deceased defendant and did not comply with the requirements of Rule 25(a)(1).

3. And for such other reasons as will be presented at the hearing of this motion.

Arthur M. Wagman
Attorney for Plaintiff
1835 K Street, N. W.
Washington, D. C. 20006

OPPOSITION TO MOTION TO VACATE ORDER AND FOR REHEARING AND RECONSIDERATION

Comes now Butler & Gorman, and opposes the Motion filed by plaintiff herein and for reason, therefore, states as follows:

1. All of the reasons cited in plaintiff's Motion were previously raised and fully argued on oral Motion before this Court. The Court, therefore, in acting was fully advised in the premises.

BUTLER & GORMAN

ORDER

Upon consideration of the motion to vacate order of May 15, 1968 and for rehearing and reconsideration filed herein, May 24, 1968 it is this 29th day of May, 19 68,

ORDERED that the said motion be and the same hereby is denied.

ROBERT M. STEARNS, Clerk

/s/ Virginia Dyer

By_____
Deputy Clerk

NOTICE OF APPEAL. 73 (B)

United States District Court for the District of Columbia

DENIS RENDE, by his mother and next friend, Mrs. Carol W. Rende, and JOHN RENDE and CAROL W. RENDE

Plaintiff.

vs.

ALFRED S. KAY

Defendant.

CIVIL No. 2632-66

NOTICE OF APPEAL

Notice is hereby given this 5th day of June, 19 68, that plaintiffs, Denis Rende, by his mother & next friend, Mrs. Carol W. Rende, & John Rende & Carol W. Rende, hereby appeal the judgment of this Court entered on the 15th day of May, 1968, in favor of the defendant, Alfred S. Kay, against said plaintiffs.

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of May, 1968 in favor of defendant, Alfred S. Kay against said plaintiffs

ARTHUR M. WAGMAN *Attorney for* Plaintiffs

1835 K Street, N. W., Wash., D. C. 20006

IN THE

UNITED STATES COURT OF APPEALS

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

EDWARD G. GORMAN
ARTHUR V. BUTLER

Butler & Gorman
1518 K Street, N. W.
Washington, D. C. 20005

Attorneys for Appellee

Washington, D. C. THIEL PRESS - 202 - 783-0626

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF ISSUE PRESENTED

In the opinion of the Appellee, the issue presented is as follows:

1. Whether the lower court properly dismissed a civil action as to a deceased defendant when neither a motion for substitution pursuant to Rule 25(a) (1) F.R. Civ. P. nor a motion for extension of time pursuant to Rule 6(b) F.R. Civ. P. was filed within 230 days

after the suggestion of death of said deceased defendant upon the record.

COUNTER STATEMENT OF THE CASE

On October 5, 1966, suit was filed in the United States District Court for the District of Columbia, by John Rende and Carol Rende, individually, and by Denis Rende, by his mother and next friend, Mrs. Carol W. Rende, against Alfred S. Kay, as defendant, as a result of injuries allegedly suffered by the minor child in an occurrence of September 3, 1966.

On October 31, 1966, an Answer was filed for the defendant, by Butler & Gorman, through Edward J. Gorman, Jr., as attorneys for defendant.

On August 27, 1967, Alfred S. Kay, the defendant died. On August 31, 1967, Edward J. Gorman, Jr. personally telephoned Arthur M. Wagman, Esquire, and informed him that Alfred S. Kay died. On September 1, 1967, Edward J. Gorman, Jr. filed a Suggestion of Death in the United States District Court for the District of Columbia, in this case, and also on September 1, 1967, a copy of the Suggestion of Death was forwarded to Arthur M. Wagman, together with a letter from Mr. Gorman confirming the telephone notice to Mr. Wagman of the death of Mr. Kay and referring to the copy of the Suggestion of Death being enclosed in the letter signed by Mr. Gorman.

No objection to the Suggestion of Death was filed at any time by counsel for the appellants.

On April 19, 1968, a Motion to Dismiss was filed together with Points and Authorities in the Court below, reflecting that more than 220 days had then passed since the filing of the Suggestion of Death and no substitution of proper party had been made. On April 22, 1968, counsel for appellants filed an Opposition to said Motion together with Points and Authorities and also filed for the

first time a Motion for Substitution of decedent's widow, not a resident of the District of Columbia, with no address given, as a party defendant in the case below.

On May 14, 1968, the Motion to Dismiss and Opposition thereto was heard by Chief Judge Edward Curran who granted the Motion to Dismiss. An Order was prepared and signed by Chief Judge Edward Curran on May 15, 1968, dismissing the case with prejudice.

Appellants then filed on May 24, 1968 a Motion to Vacate Order and for Rehearing and Reconsideration together with a sworn Affidavit of Mr. Wagman and a Memorandum of Points and Authorities. This was the first time appellants made mention of either Federal Rule 6(b) or 60(b). The Motion was denied.

SUMMARY OF ARGUMENT

The appellee submits that the ruling of the trial court granting the motion to dismiss was correct, in that:

1. The ruling of the trial court was pursuant to the express provisions of Rule 25(a) (1) F.R. Civ. P., to the effect that if no substitution is made within 90 days after a suggestion of death of a party is filed, the action shall be dismissed as to a deceased party.

2. The suggestion of death filed, was in proper form and properly served upon the parties.

3. The appellants failed to timely file any motion under Rule 6(b) F.R. Civ. P.,

4. F.R. Civ. P. 25(a) requires no showing of injury before the 90 day period provided for substitution is enforceable.

5. The trial court did not abuse its discretion in granting the motion to dismiss.

ARGUMENT

I

Rule 25(a) (1) provides that upon the record of the Court the death of a party shall be suggested by service of a statement of the fact of the death of the party, served upon other parties to the action as provided in Rule 5 of the Federal Rules of Civil Procedure. Rule 5(b) states inter alia, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the Court. Service upon the attorney or upon a party shall be made by delivering a copy to him at his last known address . . . . Service by mail is complete upon mailing."

Rule 25(a) (1) further provides, "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by *any party or by the successors* or representatives of the deceased party . . ." (Emphasis supplied)

Appellants have conceded that on September 1, 1967 appellee's counsel suggested the death of appellee. It is also admitted by appellants that no Motion for Substitution was made by them prior to the filing of the Motion to Dismiss this action, more than seven and one-half months after decedent's death was suggested upon the record. In addition, the record reflects that no motion was filed, under Rule 6(b), to enlarge the time permitted by Rule 25(a) (1) for such substitution, until after the Motion to Dismiss was heard and granted.

Appellants argue that after appellee's death they were the only parties before the Court and that the case was suspended until there

was a substitution of a proper party-defendant. To support this argument *Ex Parte Slater,* 246 U.S. 129, 62 L.Ed. 621 (1917) is cited. Appellants ignore the fact that the case cited was decided in 1917, many years before the problem was definitively resolved by the enactment of Rule 25(a) (1) of the Federal Rules of Civil Procedure and also ignore that even at that time the Supreme Court recognized the "new Equity Rules" in effect and stated such matters should be resolved by an application of the rules, "in other words, by an exercise of the judicial function." *Supra,* 193.

In support of their first argument appellants also rely on *Edmundson et al v. State of Nebraska,* 383 F.2d 123, (8th Cir. 1967), quoting from page 128 of the opinion therein rendered, as if the Court therein supported the argument advanced by appellants. A reading of the case shows that in fact the Court rejects such an argument stating:

> "As a final point, we note that a Suggestion of Death of the petitioning intervenor was properly filed with the court and served upon the interested parties. However, no request for substitution or amended intervention petition was or has been filed. This, in itself, might be grounds for the denial of intervention. (Rule 25(a)(1) Fed. R. Civ. P.) . . .
>
> "...Failure to amend or substitute leaves the court unable to act. Therefore, until a proper substitution of the deceased person's representative has been made the trial court would seem to have no choice but to dismiss the intervention as to the deceased person. Graham v. Pennsylvania Railroad, 119 U.S. App. D.C. 335, 342 F.2d 914 (1965), cert. denied 381 U.S. 904, 85 S. Ct. 1446, 14 L.Ed.2d 286; Mitchell v. Cole, 35 F.R.D. 115 (W.D. Wis. 1964)."

Thus rather than supporting appellant's position the quoted case rejects the thought that the proceedings were suspended and affirms

the lower court's dismissal for failure to substitute a proper party as provided for by Rule 25(a) (1).

Appellants also cite *Roscoe v. Roscoe*, 126 U.S. App. D.C. 317, 379 F.2d 94, (1967), in support of their position. However, in that case this court specifically referred to and followed its ruling in *Graham v. Pennsylvania Railroad, supra*, and quoted Rule 6(b) concerning enlargement of the time, ". . . if request therefore is made *before* the expiration of the period originally prescribed. . . ." (Emphasis supplied). In the instant case no such request was made.

II.

In the Court below the appellants argued that the Suggestion of Death filed herein was defective in that there was no listing of the name of the legal representative of the decedent. Appellants maintain this argument in their brief as their second Argument therein. Appellants try to engraft onto Rule 25 that which is not contained therein; namely, that the Suggestion of Death must name a representative of decedent, whereas the only requirement of Rule 25 is that a statement of the *fact* of the death be suggested upon the record and served upon other parties to the suit. In this case appellants admit that this was done.

Appellants argued below, and reiterate in their brief herein, that Form 30 contained in the appendix of forms published with the Federal Rules of Civil Procedure adds to Rule 25(a) (1) the requirement that in the Suggestion of Death the executor, administrator or other representative or successor of the deceased party must be named. Appellants thereby ignore the Introductory Statement contained in said Appendix of Forms which states, inter alia,

> "1. The following forms are intended for illustration only. . . ."

Appellants also argue that a Suggestion of Death can only be filed by a successor to the deceased party.

> "Therefore at no time was there a successor to appellee who could have noted the Suggestion of Death on the record . . ." (Appellants brief pg. 7)

Nowhere in the Court below did the appellant argue either that counsel for the deceased Alfred Kay had no right to file, or that there was any defect, in the Suggestion of Death filed in this case. These arguments are made in this Court for the first time. They are therefore not timely made.

Speaking to this argument, however, it is noted that its weakness is shown by its logical concomitant. If there is no Executor or Administrator or other representative of decedent then the fact of decedent's death cannot be suggested upon the record to the Court and to the other parties to the suit. Thus the Court cannot be apprised by anyone of the fact that one of the parties to a law suit is in fact dead and the time limit set out in Rule 25, of ninety days, can never commence to run.

In support of their argument appellants cite the case of *Talbot v. Ledgewood Circle Shopping Center,* 194 F.Supp. 191 (EDNY, 1961), a case decided before the new Rule 25(a) (1) went into effect on July 1, 1963.

After this date, however, the same circumstances existing in the instant case were before the court in *Mitchell v. Cole, supra,* on a Motion to Dismiss on the grounds that defendant was deceased and no executor or administrator had been substituted as a party defendant. The court held, at page 116:

> "First of all the matter should be dismissed because of the *failure of the plaintiff* to substitute a party de-

> fendant for the deceased defendant by way of an executor or administrator." (Emphasis supplied)

This argument of appellants seeks to avoid the time limit set forth in Rule 25(a) (1) by eliminating the right of appellee's counsel to suggest his death upon the record. This is a continuation of appellants' apparent position that until appellants acted in this case to substitute a party defendant or until some other party voluntarily entered and named himself as a proper successor to decedent, the court below would never have the right to properly reflect on its calendar that this case was no longer viable since the only defendant was deceased. Appellants thereby ignore the specific wording of Rule 25 which states that a Motion for Substitution may be made by *any* party. They wish instead to place the burden upon some unknown and perhaps non-existent person to come into the Court and apply to be made a defendant as the lawful successor to the decedent. This is to argue that until there appears a *volunteer* defendant or until appellants get around to moving the Court to appoint a proper party as successor defendant for the purpose of this case, neither the attorney for the decedent nor the Court itself may act to terminate this cause of action. Thus appellants argue that if no volunteer defendant appears, Rule 25 has no applicability to this case until they are ready themselves to have it apply. This position has been clearly rejected by the Courts in the cases previously cited herein.

Appellants also argue in their brief that appellee's widow, Mrs. Hannah Kay, was not a proper party to substitute in this action until Mrs. Kay took some action to become appointed and qualified as decedent's legal representative. Whereas appellee has never suggested that Mrs. Kay should have been made decedent's successor in this case, this argument of appellants ignores their own, "Motion for Substitution", of Mrs. Hannah Kay filed in this case on April 22,

1968 after the receipt by appellants of the Motion to Dismiss and also ignores their admission contained in the Points and Authorities filed in support of their Motion to Vacate Order and for Rehearing and Reconsideration, filed in the Court below on May 24, 1968, that they knew of both Mrs. Kay's existence and whereabouts almost immediately after receipt of the Suggestion of Death.

Nowhere either in the Court below or in the brief herein do appellants explain why they took no action from September 1, 1967 until April 22, 1968, after the Motion to Dismiss was filed. Yet appellants knew that the defendant was deceased; they knew that his will had been filed in an adjoining jurisdiction; they knew that his widow survived him and they knew of her whereabouts. Nowhere do they state that after September 1, 1967 they continually checked the records of Montgomery County Orphans Court to see if Mrs. Kay had qualified as Executrix in that Jurisdiction or in fact that they again made *any* attempt to determine if a representative had been appointed in that jurisdiction or to have any person in this jurisdiction appointed a substitute for the decedent in this cause of action.

III.

Nowhere in this case did appellants timely rely on, or file a proper motion based on, Rule 6(b). This rule was never raised until after the Court had entered its Order, when it was mentioned for the first time in appellants' Motion to Vacate Order.

In open Court appellants' counsel stated to the Court in answer to the Court's question at page 3 of the transcript of the oral argument of the Motion to Dismiss:

> Court: You got notice of the suggestion of death; what did you do about it?

> MR. WAGMAN: Waited until we found the proper party; there was no proper party at this particular time.
>
> The Court: Does it take seven and one-half months to find a proper party?

The record is clear that in the court below appellants never moved for an enlargement of the time period provided in Rule 25(a)(1) by the filing of a timely motion under Rule 6(b).

The language of Rule 25 provides that:

> "Unless the Motion for Substitution is made not later than 90 days after the death is suggested upon the record . . . the action shall be dismissed as to the deceased party." (Emphasis supplied)

It seems clear from the language that such dismissal is mandatory rather than permissible. The rule does not say the action may be dismissed, it states that the action, "*shall* be dismissed". In the same rule, the word "may" is twice used.

> "The word 'shall' is ordinarily the language of command. Escoe v. Zerbst, 295 U.S. 490, 493. And when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson v. Yongkau*, 329 U.S. 482, 485 (1947); (cf also *United States v. Thoman*, 156 U.S. 353, 356, 15 S. Ct. 378, 39 L. Ed. 450 (1895).

In addition to this clear language of the Court, the use of the word "shall" has been defined at 80 CJS 137, as:

> "In its ordinary signification, 'shall' is a word of command, and is the language of command, and is the ordinary, usual, and natural word used in connection with a mandate. In this sense 'shall' is incon-

> sistent with, and *excludes*, the idea of discretion, and operated to compose a duty which may be enforced . . . . " (Emphasis supplied)

Thus appellants having failed to move properly under Rule 25(a) (1) and also having failed to timely move under Rule 6(b) it is submitted that the action of the Court below in dismissing this action was not simply a sound exercise of its judicial discretion but was a sound exercise of the mandatory fiat imposed by Rule 25(a) (1).

Appellants also argue under argument 3 in their brief on page 9, that, "Appellants were in no position to know of appellee's death or to control suggestion of appellee's death on the record." This is in flat contradiction to the admitted facts in this case that appellants received a notice of Appellee's death. For appellants then to go on to argue that, "Appellants could not determine, control, or influence the appointment of appellee's executor or administrator," is to deny what this Court knows is patently true; that an orderly process exists whereby appellants could have moved the Court below to substitute a person as a proper successor party in this matter.

IV.

Appellants' fourth argument makes a flat assertion, without either basis or justification being given, that in order for the Court below to properly dismiss this action, there would first have had to been demonstrated an injury to appellee from appellants' failure to conform to the requirements of Rule 25(a) (1). Appellants here again either refuse to read or ignore the plain language of the rule. Appellants lack of action for, "less than eight months", is sought to be expunged by a claim that unless harm is affirmatively demonstrated the rule can not be applied.

A review of the cases cited in support of this argument reveals that *only* in the case of *Staggers v. Otto Gerdau Co., Inc.* 359 F.2d 293, (2nd Cir., 1966) did the Court extend the time under Rule 25(a) (1) in which to file a Motion to Substitute and therein the time was extended for *two* days. Such extension was granted after a showing that during the 90 day period counsel had to obtain permission from the Orphans Court of Prince George's County before he could move to substitute and that said permission was granted but five days before the expiration of the 90 day period and the motion was filed within seven days of the receipt of such permission. In that case counsel was required to and did demonstrate to the Court that he was actively engaged throughout the 90 day period in attempting to make proper substitution. There has been no such showing in the instant case, rather there has been an admission that appellants, knowing of the existence of a will filed in adjoining Montgomery County and of the existence of decedent's widow, failed to take *any action*, not only during the 90 day period but for 145 days *after* this period had run, which would have led to a proper substitution of parties.

It would therefore seem that the authority cited is distinguishable.

V.

Appellants' fifth argument is that the District Court abused its discretion in failing to enlarge the 90 day period. It is stated that the 90 day period ran after one of appellants' counsel had been discharged from the hospital only ten days. It is then argued that one of appellants' counsel was out of his office until January 2, 1968. However, this argument does not explain either the failure of this counsel to act for the 43 days prior to his accident or for more than

115 days after his return to his office, or the failure of his partner to act during the time he was incapacitated.

It should be noted here that this matter was treated as partnership business by appellants' counsel by letter of June 6, 1967 to appellee's counsel. This letter was signed "Spero and Wagman, by Arthur M. Wagman". This was followed by a letter of September 13, 1967, the next letter received from appellants' counsel, signed in the same manner. On November 8, 1967, the next letter received from appellants' counsel stated, inter alia:

> "Incidentally as a matter of partnership convenience, and because Mr. Wagman is in the hospital you will be dealing with me in the future concerning this case."

This letter was signed, "Spero and Wagman, by A. J. Spero". On December 6, 1967, the next letter received from appellants' counsel was signed in the same manner by Mr. Spero.

Additionally the Motion for Substitution filed in this case on April 22, 1968 was filed in the name of "Spero and Wagman by Arthur M. Wagman" as were the Points and Authorities in support of Opposition to Motion filed by appellants on April 23, 1968 and the Objection to Order Submitted by defendant on May 16, 1968.

There were also numerous telephone conversations with Mr. Spero as appellants' counsel in which Mr. Spero exercised dominion over appellants' case.

Appellants' arguments concerning this point were fully heard and considered by the trial court both on oral argument and in appellants' Motion for Reconsideration. However, no motion to extend the time limit of Rule 25 by reason of Rule 6(b) was at any time made below, nor was Rule 6(b) mentioned until appellants' "Motion to Vacate Order and for Rehearing and Reconsideration" filed on May 4, 1968.

This Court is now asked to hold that the Court below abused its discretion in this matter in granting the Motion to Dismiss more than eight months after the filing of the Suggestion of Death and almost five months after the 90 day period provided by Rule 25 had expired.

It has long been agreed that dismissal of a cause of action for failure to comply with the Court's rules or obey its orders was a matter for the exercise of judicial discretion and on appeal the applicable standard is that of the presence or absence of abuse of this discretion by the lower court. To upset the ruling of the lower court there must be a finding that the action of the lower court was an arbitrary one.

> "The standard we must apply, however, as indicated above, is not what we as individual judges might have done under the circumstances, but whether the District Court's action was an abuse of discretion." *Grunewald v. Missouri Pacific Railroad Co.*, 331 F.2d 983, 986 (8th Cir., 1964); [cf also *Cucurillo v. Schulte, et al.*, 324 F.2d 234 (2nd Cir., 1963) and *Parker v. Broadcast Music, Inc.*, 289 F.2d 313 (2nd Cir., 1961).]

In the case of *Producers Leasing Corporation de Cuba v. The P. R.C. Pictures, Inc.* 176 F.2d 93, (2nd Cir., 1949) there was an attempt made by counsel to show that because of ill health, on his part, there had been a failure to comply with the orders of the court. In that case the Court held that a related showing attempted to be made of ill health without any attempt to make such a showing prior to the failure to act justified the action of the trial court, in ordering that the case be dismissed.

In the case of *Graham v. Pennsylvania Railroad,* supra, this Court held the only ground for overturning a dismissal made by a lower court would be whether the District Court abused its discretion.

It is respectfully submitted that there has been no showing that District Court abused its discretion in this case.

CONCLUSION

The action of the Trial Court being not an abuse of its judicial discretion, but rather a sound exercise of its judicial responsibility, it is respectfully submitted that it should be affirmed.

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